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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 765.

RICHARD J. HOPKINS, Judge of the United States District Court for the District of Kansas, *Petitioner,*

vs.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

We propose to discuss three points:

1. The accuracy of the "statement" contained in respondent's brief.

2. The contention advanced in respondent's brief that under the correct construction of section 21 of the Judicial Code (Act of March 3, 1911, 36 Stat. 1090, 28 U.S.C. 25) every litigant who files the statutory affidavit accompanied by a certificate of counsel is entitled to one

change of venue as a matter of right without regard to the reasons he gives for his belief that personal bias and prejudice exists upon the part of the judge.

3. Respondent's answer to the conflicts shown in the petition as to the sufficiency of the reasons stated in the affidavit for belief that petitioner has a personal bias and prejudice against the United States.

I.

The statement of facts in respondent's brief is so inaccurate as to present an entirely different picture than the record. The only personal knowledge that Washington counsel have of the present controversy is that obtainable from the printed record. They do not confine themselves to the record, however, and in departing therefrom they enter a field in which the "facts" have to be supplied by imagination and conjecture. The facts themselves vary markedly from counsel's supposition of what the facts *should* be.

The statement on page 3 of the brief that Kansas lawyers and litigants follow the practice of disregarding every award and of appealing therefrom reveals the unfamiliarity of Washington counsel with Kansas practice. There is no trial or hearing before the appraisers (G. S. Kan. 1935, 26-101), but the appraisers appointed by the court are generally competent men and in the great majority of cases no appeal is taken by either party. It is true, however, that the United States has followed the practice of appealing from each and every award, regardless of amount, following which attempts are made to arrive at settlements during the period of delay incident to jury trials and the fact that not more than two terms of court are held in a year in any particular city in Kansas. In land condemnation cases in Kansas

the special attorneys for the United States have followed the not unfamiliar practice of attempting to secure settlements at their own figure by prolonged litigation.[1]

The statement on pages 3 and 4 that the experience of the United States has been that lower verdicts are returned by juries than by commissioners or courts, as a consequence of which the United States demands jury trials is a figment of counsel's imagination. As a consequence of petitioner's agreement not to try any land condemnation cases until the disposition of the present litigation a judge has been assigned to try such cases to the end that the landowners will not be longer delayed in securing the compensation held up by the appeals by the United States. The verdicts in jury trials before the assigned judge have averaged the amounts of the appraisals. In several cases they have exceeded the appraisals. This judge is more satisfactory to local counsel for the United States than the petitioner and since his designation a part of the cases are now being tried to the court. The statement on page 3 of the brief that petitioner attempted to induce government counsel to accept the awards of appraisers is not supported by the record, and is untrue in fact. The statement on page 4 that respondent's local attorneys became *persona non grata* to petitioner is not justified by anything in the record.

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[1] In his written opinion petitioner stated, "It is unfortunate indeed, and certainly regrettable that during a war emergency, when all are expected to give their time, endeavor, and money to the war effort, that delaying tactics should be adopted by attorneys representing the Government, at great expense to both the Government and the landowners involved in this litigation. (R. 37) * * * It (the court) believes that the Kansas farmers who were evicted from their homes and farms more than a year ago should not be further delayed in receiving their just compensation through tactics by counsel for the Government." (R. 45)

We take particular exception to the contents of the footnote on page 4 of the brief. Respondent says that the cases were to be tried in October and November. This was true only if juries were demanded. The cases could have been tried to the court in the summer as petitioner urged. (R. 29) The statement that October and November is a slack time for Kansas farmers reveals the lack of experience of Washington counsel with Kansas farming operations. All the cases in which affidavits of bias and prejudice were filed related to land located within the eastern one-fourth of the state. These were small farms, many of them dairy farms, not huge wheat farms such as may be found in the western part of the state. The farmers in this area work 365 days per year and they are very long days. The statement that it is customary to use the same jury to value all the different parcels involved in a particular taking is contrary to respondent's complaint filed in the court below, as well as to the fact. The complaint alleges "that on said appeals the parties are entitled to separate jury trials as to each separate tract." (R. 3) Exhibit "K" introduced by respondent shows that as many as 350 tracts are involved in a single taking. (R. 47) The greatest number of tracts presented to a single jury for evaluation up to the present time has been ten. (The greatest number of tracts tried before the assigned judge in a single action is five.) The complaint alleged that appeals involving 255 separate tracts were already pending and that 869 additional tracts were involved in cases in which no appraisals had yet been filed. (R. 3)

We refrain from discussing respondent's description of the contents of the affidavits on pages 4 to 6 of its brief. The court can read the affidavits itself and make its own conclusion as to the contents.

The statement on page 7 of the brief that all three of the judges agreed that the affidavit was sufficient is untrue. The judgment of the Circuit Court of Appeals was announced from the bench, at which time Judge Phillips announced that he dissented from the judgment of the majority for the reason that he was of the opinion that the facts and circumstances did not justify the extraordinary writ of mandamus and that entertaining that view he had not considered any of the other questions raised. It is only fair to state, however, that none of respondent's present counsel were present at the time.

II.

The petition for certiorari was filed upon the theory that the decision of the Circuit Court of Appeals for the Tenth Circuit was in conflict with the decisions of other Circuit Courts of Appeals as to the legal sufficiency of the grounds stated in the affidavit for belief that petitioner had a personal bias and prejudice against the United States. We did not contend that the Circuit Court of Appeals ignored the decisions of this court and of every other Circuit Court of Appeals upon the fundamental rule that it is the duty of the trial judge to consider the affidavit of personal bias and prejudice and to pass upon the legal sufficiency of the stated grounds for belief that personal bias and prejudice exists.

Respondent's brief, however, presents a more striking and imperative reason for granting the writ than the petition itself. Respondent's opposition to the granting of the writ is founded primarily (almost exclusively) upon the theory that the intent of the statute is to entitle every litigant who complies with its terms to one change of venue wihout regard to the reasons he gives for his belief that a judge has a personal bias and prejudice against

him or in favor of his adversary. Respondent's *present* interpretation of the statute is concisely stated on page 13 of its brief as follows:

> "Thus, it is clear from the foregoing history that Congress intended Section 21 to confer upon every litigant in the federal courts the right to demand one change of venue in every case when he and his counsel were willing to file an affidavit stating 'the facts and the reasons for the belief * * * that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit.'"

This construction of the statute is at odds with the decisions of this court and of every Circuit Court of Appeals which has had occasion to pass upon the question. In *Berger v. United States,* 255 U. S. 22, upon which respondent relies, the questions certified were the following:

> "(1) Is the aforesaid affidavit of prejudice sufficient to invoke the operation of the act which provides for the filing of affidavit of prejudice of a judge?
>
> "(2) Did said Judge Landis have the lawful right to pass upon the sufficiency of the said affidavit of his prejudice, or upon any question arising out of the filing of said affidavit?
>
> "(3) Upon the filing of the said affidavit of prejudice of said Judge Landis, did the said Judge have lawful right and power to preside as judge on the trial of plaintiffs in error upon said indictment?"

Those questions were answered by the court as follows:

> "We come, then, to the questions certified, and to the first we answer, Yes; that is, that the affidavit

of prejudice is sufficient to invoke the operation of the act. To the second we answer that, to the extent we have indicated, Judge Landis had a lawful right to pass upon the sufficiency of the affidavit. To the third, we answer No; that is, that Judge Landis had no lawful right or power to preside as judge on the trial of defendants upon the indictment."

Our interpretation of the court's opinion is that it is the duty of the district judge to pass upon the legal sufficiency of the affidavit of bias including the legal sufficiency of affiant's grounds for belief that bias and prejudice exists, but that the district judge must accept as true the statements of fact in the affidavit. That interpretation of the opinion in the Berger case and of the statute has been adopted by the various Circuit Courts of Appeals.[2]

A typical statement of the rule followed by the Circuit Courts of Appeals is found in *Simmons v. United States,*[3] where the court said, "The judge may not consider whether the facts are truthfully recited, but he may pass upon their sufficiency as showing personal prejudice."

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[2] First Circuit: *Craven v. United States,* 22 F. 2d 605, cert. den. 276 U. S. 627; Second Circuit: In re Lisman, 89 F 2d 898; Fourth Circuit: *Morse v. Lewis,* 54 F. 2d 1027, cert. den. 286 U. S. 557; Fifth Circuit: *Simmons v. United States,* 89 F. 2d 591, cert. den. 302 U. S. 700; Sixth Circuit: *Refior v. Lansing Drop Forge Co.,* 124 F. 2d 440, cert. den. 316 U. S. 671; Eighth Circuit: *Cuddy v. Otis,* 33 F. 2d 577; Ninth Circuit: *Price v. Johnston,* 125 F. 2d 806, cert. den. 316 U. S. 677; Tenth Circuit: *Mitchell v. United States,* 126 F. 2d 550, cert. den. 316 U. S. 702.

[3] 5 Circuit., 89 F. 2d 591, cert. den. 302 U. S. 700.

The construction given to the statute in the cases cited in the footnotes is a construction which the Department of Justice has heretofore consistently advocated.[4]

The brief of respondent presents the peculiar situation of the Department of Justice asking that certiorari be *denied* because this court and all the Circuit Courts of Appeals, except the court below (and it in only this instance), have erroneously construed a Federal statute for the past thirty years. The situation is even more singular in that the construction of the statute which the Department of Justice now contends is erroneous is one which it has always before successfully advocated.

If we assume that the construction of the statute for which the Department of Justice now contends is the correct one, it would seem imperative that the writ of certiorari should be granted so that this court might correct the erroneous interpretation placed upon an important Federal statute by it and all the lower courts which have followed its authoritative, but erroneous, statement of the law. If the interpretation of the statute is to be changed it should be done by the court rather than by the Department of Justice. One thing is certain—the statute must be construed in the same fashion whether an affidavit of bias and prejudice is filed by the United States or by one of its citizens. If the judgment of the court below is to be sustained upon the ground that the statute has been incorrectly construed in the past an announcement of that fact should be made by this court so that the lower courts and private litigants may be guided thereby.

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[4] See for example *Craven v. United States,* supra; *Simmons v. United States,* supra; *Cuddy v. Otis,* supra; *Mitchell v. United States,* supra.

III.

So much stress is laid in respondent's brief upon the novel contention above discussed that the question raised in the petition as to the conflict between the decision of the Circuit Court of Appeals and the decisions of other Circuit Courts of Appeals as to the sufficiency of the grounds stated in the affidavit for belief that petitioner has a personal bias and prejudice against the United States has almost been ignored in respondent's brief. This is only natural since respondent's primary contention necessarily admits a conflict with the decisions of other Circuit Courts of Appeals. The subject of the sufficiency of the grounds stated in the affidavits for belief that personal bias and prejudice exists within the rules heretofore followed by the various Circuit Courts of Appeals is disposed of by respondent in two short paragraphs of its brief. (Top of page 17, first paragraph page 18.) Only the Berger case is cited and it is not applied to the facts of the case at bar. Along with the court, we are left in the dark as to respondent's theory as to which of petitioner's rulings or remarks of which complaint is made in the affidavit are claimed to show personal bias and prejudice and as to respondent's reasons for arriving at that conclusion.

Respondent does make it plain that it contends that bias and prejudice against an agent or attorney of the United States is bias and prejudice against the United States itself since it can only act through agents. (Brief, pp. 18, 19.) If this is true as to a public corporation it must be equally true as to a private corporation for the same reason. The statute requires that the affidavit must be made by a "party" and must state that the judge "has a personal bias and prejudice * * * against him," not against his agents or attorneys. Respondent advances neither ar-

gument nor authority in support of its theory that the statute means something other than it appears to say. Respondent's contention upon this point is apparently closely related to its contention that every litigant is entitled to one change of venue as a matter of right. If the statute is construed to mean that personal bias against an *attorney* is personal bias against a *party* every litigant could secure a new judge by choice of his counsel. He could file an affidavit that the judge was prejudiced against his attorney and as grounds for such a belief could truthfully aver that in some previous case the judge had reprimanded his counsel for an improper argument to a jury or for persistently following a line of examination which the judge had held to be improper. Even if we assume that prejudice against an attorney is prejudice against the United States we are still not furnished by respondent with any inkling of the basis for respondent's conclusion that one or more of the rulings or remarks complained of indicate personal bias and prejudice upon the part of petitioner against respondent's counsel or other agents of the United States.

Respondent makes the statement that personal bias and prejudice within the meaning of the statute is satisfied by a showing of prejudice "against the United States as a litigant * * * when the United States is a particular type of litigant. (Brief, p. 18.) This contention eliminates the word "personal," which the Circuit Courts of Appeals have held to be the most important word in the statute.[5] As the United States has frequently contended, a judge having a particularly strong feeling against bank robbery or election frauds is not thereby

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[5] *Craven v. United States*, supra.

disqualified from trying one charged with those crimes, because he does not have the personal bias against a party which is mentioned in the statute.[6]

On page 19 of its brief respondent argues that the requirements of the statute that the affidavit be made by a party and be accompanied by a certificate of counsel of record to the effect that it is filed in good faith are satisfied by an affidavit by counsel of record who certify that their own affidavit is filed in good faith. Respondent states this procedure is sufficient because a body corporate can act only through agents and its attorneys of record were acting in separate and distinct capacities in making the affidavit and in certifying that it was filed in good faith. This argument disregards the fact that the purpose of requiring both an affidavit of a party and a certificate of counsel was to prevent abuse of the privilege afforded by the statute. What safeguard was there in this case? An attorney who makes an affidavit of bias and prejudice would certainly have no hesitancy in certifying that he made it in good faith. Judges would be disqualified at the whim of counsel.

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[6] *Price v. Johnston*, supra; *Ryan v. United States*, 8 Cir., 99 F. 2d 864, cert. den. 306 U. S. 635.

CONCLUSION.

The contention of respondent that the intent of section 21 of the Judicial Code is to make a change of judge a matter of right upon the filing of an affidavit of bias and prejudice is a concession that certiorari should be granted so that the erroneous interpretation now followed by the courts may be corrected. Respondent's failure to advance any theory upon which the judgment of the Circuit Court of Appeals can be reconciled with the decisions of other Circuit Courts of Appeals cited on pages 10 to 13 of the petition for certiorari is an admission that a conflict exists.

We respectfully submit that the petition for a writ of certiorari should be granted.

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